

Memorandum 2016-50

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Public Comment

Comments from knowledgeable sources are of great value in the Commission’s study process, which is careful and deliberative.¹ Throughout this study of the relationship between mediation confidentiality and attorney malpractice, the Commission has been fortunate to receive much input on the topic. The Commission appreciates the effort involved and thanks all of the individuals and groups that have taken the time to share their views.

Since the July meeting, the Commission has received the following new comments:

Exhibit p.

- Eddie Bernacchi, et al., on behalf of Air Conditioning Sheet Metal Ass’n, California Chapters of the National Electrical Contractors Ass’n, California Legislative Conference of the Plumbing, Heating & Piping Industry, Northern California Allied Trades, Wall & Ceiling Alliance, Associated General Contractors, California Building Industry Ass’n, Construction Employers Ass’n, Southern California Contractors Ass’n, United Contractors & Western Line Constructors (8/24/16) 1
- Gregory Herring, Herring Law Group (9/14/16) 3
- Jeff Kichaven, Los Angeles (9/1/16) 14
- Nancy Neal Yeend (9/7/16) 17
- Supplemental comments from individuals signing the online petition by Citizens Against Legalized Malpractice 18

We discuss these new comments below and then describe a few other new developments.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

For further information on the Commission’s study process, see http://www.clrc.ca.gov/Menu5_about/process.html; see also 2013-2014 Annual Report, 43 Cal. L. Revision Comm’n Reports 253, 264-73 (2013), available at <http://www.clrc.ca.gov/pub/Printed-Reports/Pub238-AR.pdf>.

COMMENT FROM A COALITION OF CONSTRUCTION INDUSTRY ORGANIZATIONS

The Commission received a comment from a coalition of eleven construction industry organizations (hereafter, “the Construction Industry Coalition”) consisting of:

- (1) Air Conditioning Sheet Metal Association (“ACSMA”), represented by Eddie Bernacchi.
- (2) California Chapters of the National Electrical Contractors Association (“NECA”), represented by Eddie Bernacchi.
- (3) California Legislative Conference of the Plumbing, Heating & Piping Industry (“CLC”), represented by Eddie Bernacchi.
- (4) Northern California Allied Trades (“NCAT”), represented by Eddie Bernacchi.
- (5) Wall & Ceiling Alliance (“WACA”), represented by Eddie Bernacchi.
- (6) Associated General Contractors (“AGC”), represented by Dave Ackerman.
- (7) California Building Industry Association (“CBIA”), represented by Nick Cammarota.
- (8) Construction Employers Association (“CEA”), represented by Scott Govenar.
- (9) Southern California Contractors Association (“SCCA”), represented by Todd Bloomstine.
- (10) United Contractors (“UCON”), represented by Emily Cohen.
- (11) Western Line Constructors, represented by Bret Barrow.²

These construction industry organizations “comprise a significant number of all commercial, industrial and infrastructure contractors and subcontractors in California.”³

This is a major new development, because these organizations have not previously commented in this study and they are not part of the mediation community or the legal community. Rather, their member contractors “are regular users of mediation which saves them substantial time and money, and preserves important business relationships.”⁴

2. Exhibit pp. 1-2.

3. Exhibit p. 1.

4. Exhibit p. 2.

The Construction Industry Coalition has “concerns with the current direction of the Law Revision Commission study K-402.”⁵ More specifically, its letter explains:

Since its August 7, 2015 vote, the Commission has pursued the development of a recommendation to the Legislature which would *severely harm our members*. If adopted in its present framework, it would remove our current confidentiality protections if any of the parties drawn into construction defect cases later filed a claim against their lawyer alleging misconduct in the mediation. The result would be that our members could later be forced to produce and repeat, under oath, anything they may write or say in mediation. This will create uncertainty for all participants and will destroy the safe honest communications and effective mediations that our members currently rely on.⁶

As far as the coalition is concerned, an uncertain confidentiality provision is little better than no confidentiality protection at all.⁷

The Construction Industry Coalition reports that it has surveyed members “who rely on mediation regularly.”⁸ It says that the following responses are typical:

- “This proposal would be a flat out disaster. One of the keys to mediation is indeed the confidentiality. It would destroy much of what is mediated and force many more matters to costly litigation.”
- “I believe the confidentiality portion of mediation is very important.... We are continually pulled into cases of false accusations merely by being associated with a project.”
- “Confidentiality in mediation is what makes it successful. It allows all parties to be completely honest in their negotiations, without the fear of having the information brought forth against their case in legal proceedings. Mediation helps find the middle ground for all parties involved, allowing everyone to walk away with the best case legal scenario for their circumstance. Eliminating confidentiality would not only reduce the effectiveness of mediation as a tool, it would completely destroy it.”⁹

The Construction Industry Coalition thus urges the Commission to “reverse its current course and return to the choices presented to it by staff at its August 7,

5. Exhibit p. 1.

6. *Id.* (emphasis added).

7. See *id.*

8. *Id.*

9. *Id.*

2015 meeting.”¹⁰ More specifically, the coalition encourages the Commission to “pursue the options in Staff Memorandum 2015-33 that would both address the underlying problem identified and preserve our current confidentiality.”¹¹

The Construction Industry Coalition also points out that “formation of responsible public policy often involves difficult choices and trade-offs.”¹² In its view, the Commission’s time and resources would “be much better spent developing options which do not destroy the very widespread benefits of our current mediation confidentiality protections.”¹³ The coalition warns that if the Commission “persists in its current direction when it makes its formal recommendation to the Legislature, our opposition to the legislation will regretfully become a priority.”¹⁴

COMMENT FROM THE HERRING LAW GROUP

Attorney Gregory Herring of the Herring Law Group has submitted a long, carefully written letter¹⁵ “on behalf of a longtime client who has been negatively affected by mediation confidentiality, which she alleges allowed her purported ‘mediator’ to strip her of literally **tens if not hundreds of millions of dollars.**”¹⁶ Mr. Herring’s client has been involved in litigation relating to alleged mediator misconduct for the past thirteen years;¹⁷ she recently lost a summary judgment motion in a case that is now pending on appeal.¹⁸

Mr. Herring describes the litigation from his client’s perspective, using fictional names (although the facts and information are a matter of public record).¹⁹ In so doing, his point is not to analyze or pursue his client’s legal claims. As he puts, “forests have already been sacrificed.”²⁰ Rather, he seeks to “add a new perspective to the [Commission’s] discussion and encourage reforms.”²¹ The views presented in his letter are those of his client, and do not necessarily reflect the views of his firm or its lawyers.²²

10. Exhibit p. 2.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Exhibit pp. 3-13.

16. Exhibit p. 3 (footnote omitted; boldface in original).

17. *Id.*

18. Exhibit p. 6.

19. Exhibit p. 3 n.3.

20. Exhibit p. 6.

21. *Id.*

22. Exhibit p. 3 n.1.

Mr. Herring and his client “realize that the Commission has focused on mediation confidentiality in relation to attorney misconduct.”²³ He says his client’s story “shows how, under current law, “**mediators,**” too, can negligently and even purposely perpetuate wrongdoing under mediation confidentiality.”²⁴

In short, his client claims to have been defrauded in connection with a mediated marital settlement agreement (“MSA”). Before their divorce, she and her husband shared a business manager, who was with an accountancy and financial services firm (collectively, “the Firm”). The Firm acted as the mediator for the couple’s divorce, yet it had a stake in the couple’s biggest asset, a widget factory. For purposes of the MSA, the widget factory was valued at \$8 million and his client was awarded half of that amount (i.e., \$4 million). Only two weeks after his client signed the MSA, “she was shocked to read a press report that [her ex-husband] was in negotiations to sell the widget factory for **\$1.6 billion.**”²⁵ She attempted to undo the MSA, but the trial court ruled against her and that ruling was upheld on appeal, “largely based on her lack of admissible evidence.”²⁶

She then sued the Firm, contending that “the Firm fraudulently induced her into ‘mediation,’ committed professional negligence and breached its fiduciary duties.”²⁷ Among other things, she unsuccessfully argued that “there was no ‘mediation’ and thus no mediation confidentiality,”²⁸ and “the Firm was not ‘neutral’ and therefore not subject to the protection of mediation confidentiality.”²⁹

The trial court apparently reasoned that the term “neutral” as used in the mediation confidentiality statute means someone who is not a party to the dispute; the “neutral” does not have to be unbiased. As Mr. Herring puts it, “[t]he trial court found that, even though the Firm did not act ‘neutral’ in the sense that it was free of bias, ‘neutral’ merely refers to the ‘intended role of the person in the mediation.’”³⁰ The trial court also determined that the Evidence Code does not require a mediator to disclose conflicts of interest, and does not condition mediation confidentiality on the disclosure of, or the absence of, such conflicts.³¹

23. Exhibit p. 4.

24. Exhibit p. 4 (boldface in original).

25. Exhibit p. 5 (boldface in original).

26. *Id.*

27. *Id.*

28. *Id.*

29. Exhibit p. 6.

30. *Id.*

31. *Id.*

Thus, the trial court ruled against Mr. Herring's client and she appealed. According to Mr. Herring:

Mediation confidentiality prevented [his client] from obtaining and presenting potentially relevant evidence toward holding the Firm accountable. It prevented her from even alluding to what occurred during "mediation." Absent those abilities, she had no chance.³²

Mr. Herring further states that "**Reforms are Necessary to Protect against Biased Mediators and to Educate Litigants about the Ramifications of Mediation Confidentiality.**"³³

His client "is aware of the Commission's fundamental charge relating to a potential exception to attorney-client confidentiality in the mediation environment."³⁴ Because she does not blame her attorney for her situation, "she respectfully **refrains** from directly commenting."³⁵

"Toward reform **beyond** the issue of a potential exception to the attorney-client privilege under mediation confidentiality," his client urges several proposals.³⁶ In particular,

- "Evidence Code section 1115, subdivision (b) ought to be revised to require **true neutrality** of mediators. Its current use of the term '**neutral person**' ought to mean more than 'someone with a pulse who is not one of the parties.' This should be accompanied by an express assertion of public policy **embracing** disclosure and **rejecting** bias."³⁷
- "The law should be revised to require the pre-mediation presentation to parties of mandatory **written conflicts disclosures** that identify all of a mediator's existing as well as reasonably foreseeable future involvement with either party. It should have to be updated through the mediation's termination."³⁸
- "The law should be revised to require the pre-mediation presentation to parties of **written notifications** that inform them of the **existence and scope, and actual and potential ramifications** of mediation confidentiality. Among other things, it should warn that, under mediation confidentiality, any post-settlement discoveries of misrepresentations, omissions, or fraud that might

32. Exhibit pp. 5-6 (footnote omitted).

33. Exhibit p. 7 (boldface in original).

34. Exhibit p. 13.

35. Exhibit p. 13.

36. Exhibit p. 8 (boldface in original).

37. Exhibit p. 8 (boldface in original).

38. *Id.*

have been committed in mediation would be difficult to investigate or rectify.”³⁹

- “The written notifications should include an express **option to waive confidentiality**. Parties can and do settle their cases in non-confidential circumstances, and they should know that it is their right to try a non-confidential approach. They should be aware that ‘confidentiality’ is **their option** instead of a tacit and apparently (to parties) unavoidable expectation of the mediation ‘system.’ It would hurt **no one** to provide parties the opportunity to make an educated choice; **choice would be good.**”⁴⁰

Mr. Herring’s letter also includes suggestions regarding how to investigate and enforce the requirements advocated above.⁴¹ The letter further states that “implementation of the above proposals against mediator bias and for written disclosures, notifications, and waivers would serve the interests of justice, while still maintaining public policy favoring mediation.”⁴²

Mr. Herring’s client and an attorney from his office plan to attend the upcoming Commission meeting. **In considering what they have to say, the Commission should bear in mind that his client’s case is still pending and be careful not to influence the result.**

The Commission should also **bear in mind the scope of the current assignment from the Legislature.**⁴³ This is especially important in an area as contentious as mediation confidentiality.

COMMENT FROM JEFF KICHAVEN

Mediator Jeff Kichaven has submitted another letter regarding mediation confidentiality experiences in other jurisdictions.⁴⁴ He says that “[i]f any state can legitimately be compared to California, it is New York.” In his view, “New York’s experience with mediation confidentiality supports the position that the Commission’s contemplated changes to California confidentiality law will have no adverse effect, will not dissuade people from mediating, and will not lead to an inappropriate increase in legal malpractice cases.”⁴⁵

39. Exhibit p. 9.

40. Exhibit p. 10.

41. See Exhibit pp. 10-12.

42. Exhibit pp. 12-13.

43. See 2016 Cal. Stat. res. ch. 150. For a detailed discussion regarding the proper scope of this study, see Memorandum 2015-34.

44. Exhibit pp. 14-16.

45. Exhibit p. 14.

The remainder of his letter sets forth his reasoning. Among other things, he notes that lots of mediation takes place in New York, which has “minimal mediation confidentiality.”⁴⁶ He does not provide any data on how the volume and nature of mediation in New York compares with the volume and nature of mediation in California (population-adjusted or otherwise). As we have discussed on prior occasions, such empirical data is hard to come by.⁴⁷

COMMENT FROM NANCY NEAL YEEND

The Commission also received another letter from mediator Nancy Neal Yeend, in which she continues to stress (1) the importance of “remov[ing] attorney malpractice protection,” (2) the alternative possibility of requiring informed consent from each mediation participant, and (3) the need to address mediator malpractice.⁴⁸ Ms. Yeend also provides her views on what to conclude from available data on mediation rates, mediation confidentiality, and instances of attorney malpractice. She “implore[s] the Commission to take a strong stand against continuing to protect both attorney and mediator malpractice.”⁴⁹ She warns that “[w]ithout recommending the elimination of the continued protection of malpractice, the present rule makes a mockery of California’s long touted mantra of consumer protection, and holding attorneys to the highest standards of conduct.”⁵⁰

UPDATE ON ONLINE PETITION

As of September 20, 2016, the online petition by Citizens Against Legalized Malpractice had about 640 signatories.⁵¹ A few of the new signatories provided brief supplemental comments.⁵²

None of those supplemental comments refers to a mediation. However, Robert Garcia in Arizona says “I’m a Victim of this Corruption,” and “[s]omebody please contact me.”⁵³

46. Exhibit p. 16.

47. See Memorandum 2015-5.

48. Exhibit p. 17.

49. *Id.*

50. *Id.*

51. For the text of the petition, see Memorandum 2016-30, pp. 9-10.

52. Exhibit p. 18.

53. *Id.*

The staff does not have contact information for Mr. Garcia. If he would like to provide further information to the Commission, he could submit a comment by email to bgaal@clrc.ca.gov.

OTHER NEW DEVELOPMENTS

A few other new developments are worth noting here:

- Mediator Lee Blackman has been participating in the Commission's study. He recently wrote an article for the Daily Journal in which he criticized the Commission's current approach.⁵⁴
- Another recent Daily Journal article, by attorney Michael Diliberto, discusses the applicability of California's mediation confidentiality statute in federal court.⁵⁵
- Commissioner Capozzola recently drew the staff's attention to two cases:

Kurwa v. Polly Fu Ju Cheng,⁵⁶ an unpublished decision in which the Second Appellate District ruled that a litigant's fraud claims seeking rescission of a settlement agreement were barred by California's mediation confidentiality statute.

Sony Computer Entertainment America v. HannStar Display Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.),⁵⁷ a decision in which the Ninth Circuit ruled that federal privilege law applied to a case, not California's mediation confidentiality statute. The case is further discussed in Mr. Diliberto's article (mentioned above).

We appreciate Commissioner Capozzola's assistance in alerting us to pertinent materials and encourage others to do the same.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

54. See Lee Blackman, *Balancing Confidentiality and Accountability in Mediation*, Daily J. (Aug. 26, 2016).

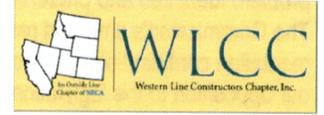
55. See Michael Diliberto, *Whose Privilege Is It Anyway?*, Daily J. (Sept. 15, 2016).

56. 2009 Cal. App. Unpub. LEXIS 2899 (April 13, 2009).

57. 2016 U.S. App. LEXIS 16199 (Sept. 1, 2016).



CONSTRUCTION
EMPLOYERS'
ASSOCIATION



August 24, 2016

Mr. Taras Kihiczak, Chairperson
California Law Revision Commission
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

Re: Opposition to Current Direction of Law Revision Commission Study K-402

Dear Chairperson Kihiczak and Commissioners:

On behalf of the construction organizations referenced above and listed below, which comprise a significant number of all commercial, industrial and infrastructure contractors and subcontractors in California, we are writing to convey our concerns with the current direction of the Law Revision Commission study K-402. Specifically, our concerns are focused on the proposed elimination of confidentiality protections in mediation.

Since its August 7, 2015 vote, the Commission has pursued the development of a recommendation to the Legislature which would severely harm our members. If adopted in its present framework, it would remove our current confidentiality protections if any of the parties drawn into construction defect cases later filed a claim against their lawyer alleging misconduct in the mediation. The result would be that our members could later be forced to produce and repeat, under oath, anything they may write or say in mediation. This will create uncertainty for all participants and will destroy the safe honest communications and effective mediations that our members currently rely on.

As the Commission's staff pointed out in its Staff Memorandum 2016-18:

"The United States Supreme Court has warned that "an uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. A measure of unpredictability already exists with regard to mediation confidentiality in California, but the Commission's proposal as currently conceived could significantly increase that level."

We have surveyed many of our members who rely on mediation regularly. Typical responses included:

"This proposal would be a flat out disaster. One of the keys to mediation is indeed the confidentiality. It would destroy much of what is mediated and force many more matters to costly litigation."

"I believe the confidentiality portion of mediation is very important...We are continually pulled into cases of false accusations merely by being associated with a project."

"Confidentiality in mediation is what makes it successful. It allows all parties to be completely honest in their negotiations, without the fear of having the information brought forth against their case in legal proceedings. Mediation helps find the middle ground for all parties involved, allowing everyone to walk away with the best case legal scenario for their circumstance. Eliminating confidentiality would not only reduce the effectiveness of mediation as a tool, it would completely destroy it."

August 24, 2016

Opposition to Study K-402

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As you can see, our member contractors are regular users of mediation which saves them substantial time and money, and preserves important business relationships. Because of this, we urge the Commission to reverse its current course and return to the choices presented to it by staff at its August 7, 2015 meeting. We urge the Commission to pursue the options in Staff Memorandum 2015-33 that would both address the underlying problem identified and preserve our current confidentiality. The formation of responsible public policy often involves difficult choices and trade-offs. The Commission's time and resources will be much better spent developing options which do not destroy the very widespread benefits of our current mediation confidentiality protections. If the Commission persists in its current direction when it makes its formal recommendation to the Legislature, our opposition to the legislation will regretfully become a priority.

For these reasons, we urge the Commission to step back now and change course before crafting its recommendation within the current framework. Thank you for your consideration of this request.

Kindest regards,



Eddie Bernacchi (bernacchi@politicogroup.com)
Air Conditioning Sheet Metal Association (ACSMA)
California Chapters of the National Electrical Contractors Association (NECA)
California Legislative Conference of the Plumbing, Heating and Piping Industry (CLC)
Northern California Allied Trades (NCAT)
Wall And Ceiling Alliance (WACA)



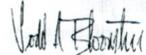
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September 14, 2016

VIA U.S. AND ELECTRONIC MAIL

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Re: Study K-402 – Mediation Confidentiality (**AMENDED**)

Dear Ms. Gaal:

This letter amends and replaces the letter I previously sent you on September 12, 2016. I am requested to communicate concerning mediation confidentiality and the Commission's review of the current law. I write on behalf of a longtime client¹ who has been negatively affected by mediation confidentiality, which she alleges allowed her purported "mediator"² to strip her of literally **tens if not hundreds of millions of dollars**. Our client, Catherine,³ has been engaged in litigation regarding "mediator misconduct" since her divorce was settled in 2003. Although the facts are compelling, California's mediation laws insulated the

¹ The views reflected herein are those of my client, whom I began representing after her below state court appeal ran its course in 2006. This focuses on her story. The views herein do not necessarily reflect those of our firm or our individual lawyers.

² As discussed below, our client has argued that the subject proceeding was not a "mediation" since the "mediator" was not a "neutral person" (Evid. Code §1115(b)) and for other reasons.

³ Although the facts and information regarding my client's subsequent litigation is in the public record, as requested by the Commission I will refer to my client as **Catherine** (not her true name). I will refer to her former spouse as **John**.

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EX 3



parties Catherine claims defrauded her. Hers is a dramatic example, but it is far from the only story of mediation distress and abuse.

We realize that the Commission has focused on mediation confidentiality in relation to attorney misconduct. Catherine's story shows how, under current law, "**mediators**," too, can negligently and even purposely perpetuate wrongdoing under mediation confidentiality. She hopes her experience adds a new aspect to the discussion and encourages reforms.

Catherine advocates for a **notice requirement** prior to any proceeding that might be deemed a "mediation" under Evidence Code section 1115 and thus made subject to the confidentiality provisions of Evidence Code section 1119. She also requests consideration of a **requirement of a mediator's subjective neutrality**. The concepts are further discussed below.

I. Catherine's Story.

This tells the story of a client, "Catherine,"⁴ who believes she saw the mediation process permit her purported "mediator" to strip her of tens, if not hundreds, of millions of dollars.⁵ It is told from Catherine's perception. Her former husband and her "mediator" have disputed many of her allegations. This does not pretend to re-litigate or adjudicate the cases against them – forests have already been sacrificed.

Similarly, this refrains from analyzing Catherine's potential claims against her prior attorney – she did not find him blameworthy and maybe he was not. The point is not to conduct a comprehensive *post-mortem* analysis of Catherine's prior experience, but to add a new perspective to the discussion and encourage reforms.

A. The "Mediated" Divorce and Later Discovery of Apparent Wrongdoing.

Catherine is the former spouse of John, who created a well-known asset – call it a "widget factory" - during the parties' marriage. The parties shared a business manager, who was with an accountancy and financial services firm (together, the "Firm").

When Catherine's and John's separation appeared imminent, the Firm reached out to Catherine, offering to help informally resolve the then-apparently-imminent divorce. What it did not reveal to her in inducing her into the process is that the Firm was aiming for John's lucrative post-divorce financial services business, which could follow if he received the widget factory in the division of assets. It did not reveal that the Firm felt that the divorce had to be rushed to

⁴ Catherine is not her real name. This also refers to her former spouse as John (not his real name either). I represented Catherine in certain post-judgment matters that are not discussed. I also carefully followed the civil court litigation described herein.

⁵ As discussed below, Catherine unsuccessfully argued that her settlement proceeding was not a "mediation" since the "mediator" was not a "neutral person" pursuant to Evidence Code section 1115, subdivision (b), and for other reasons.



completion in order for the Firm to begin making its pitch to John. Catherine asserts these facts based on some internal Firm emails she was initially able to obtain before her further discovery efforts were terminated by mediation confidentiality.

Had Catherine been informed of the facts as she now understands them, she would not have agreed to enter into negotiations with the Firm acting as “mediator.” She would not have agreed that the negotiations would be deemed “confidential.” As with many litigants, though, Catherine had **no clue** about the “mediation” chapter of the Evidence Code.⁶ She had **no clue** how it could substantially affect and even harm her.

In the divorce negotiations, the parties addressed the value of the community’s interest in the widget factory. The Firm (and John) noted the uncertain status of future income. The community’s interest in the widget factory was valued in “mediation” at **\$8 million**, in keeping with John’s representations. Catherine, who felt constant pressure from the Firm to make a deal, signed off in 2003 and was awarded half of this amount (i.e. \$4 million) in the overall division of assets.

Catherine later learned that John gave members of the Firm \$50,000 wristwatches in appreciation for their settlement work.

Only two weeks after Catherine signed the Marital Settlement Agreement (“MSA”), she was shocked to read a press report that John was in negotiations to sell the widget factory for **\$1.6 billion**. Catherine immediately contacted her original attorney regarding her divorce settlement.

John hastily signed the MSA the day after Catherine raised the issue, and then filed a motion for enforcement of the MSA as the parties’ judgment. Catherine argued that her consent was procured by fraud, and that John failed to disclose the true value of the community assets. The family law trial court ruled against her. In 2006 the ruling was upheld on appeal, largely based on her lack of admissible evidence.

B. Catherine’s Subsequent Suit: Mediation Confidentiality Shields the Firm.

Following the above proceedings that upheld and enforced the MSA, Catherine filed a new lawsuit against the Firm as her remaining source of remedy. Her general theories were that the Firm fraudulently induced her into “mediation,” committed professional negligence and breached its fiduciary duties.

Catherine argued in part that there was no “mediation” and thus no mediation confidentiality. She lost that point based on the broad definition of “mediation” provided in Evidence Code section 1115, subdivision (a).⁷

⁶ The mediation chapter begins at Evidence Code section 1115.

⁷ Section 1115, subdivision (a) provides, “[m]ediation means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.”



She also argued that the Firm was not “neutral” and therefore not subject to the protection of mediation confidentiality. The term **“neutral person,”** as used in subdivisions (a) and (b) of section 1115, is not defined in the mediation statutes nor has it been explicitly defined in any appellate authority.

The trial court researched the legislative history of Evidence Code section 1115, subdivision (b) and ruled that **the only “neutrality” required for one to become a mediator is merely one’s objective status as a non-party.**⁸ The trial court found that, even though the Firm did not act “neutral” in the sense that it was free of bias, “neutral” merely refers to the “intended role of the person in the mediation.”

The trial court continued:

“... [T]here is nothing in the statutory scheme governing the mediation privilege in [the] Evidence Code ... that requires a mediator to disclose conflicts of interest such, or, more importantly, that conditions mediation privilege on disclosure of such conflicts, or on the absence of such conflicts.” [Emphasis added.]

It continued:

“Thus, though it may be true that it is good practice that only persons without prior relationships with both sides on a mediation act as a mediator [citations omitted], this is not a condition to mediation privilege And, although mediators in court-connected mediation programs must disclose conflicts (Cal. Rules of Court, rule 3.855), **[neutrality] is not a condition to mediation privilege**”⁹ [Emphasis added.]

The trial court made the above analysis in relation to Catherine’s early motion to compel discovery. Its denial of that motion prevented Catherine from obtaining information and materials that Catherine believed would have helped her prove her case. The trial court’s same analysis then became a basis for its eventual granting of the Firm’s motions for summary judgment that recently terminated the case in the Firm’s favor. Catherine is currently appealing those rulings.

Under the broad definition of “neutral” and the strong and broad doctrine of mediation confidentiality, the Firm has to date been able to escape trial. Mediation confidentiality

⁸ Section 1115, subdivision (b) provides, “[m]ediator means a **neutral person** who conducts a mediation.” The section also includes assistants as “mediators.” (Emphasis added.)

⁹ Actually, “[t]he mediation confidentiality statutes **do not** create a ‘privilege’ in favor of any particular person. [Citations omitted.] ... The mediation confidentiality statutes govern only the narrow category of mediation-related communications, but they apply broadly within that category, and are designed to provide maximum protection for the privacy of communications in the mediation context.” (*Cassel v. Super. Ct. (Wasserman, et al.)* (2011) 51 Cal.4th 113, 132 (emphasis added).)



prevented Catherine from obtaining and presenting potentially relevant evidence toward holding the Firm accountable. It prevented her from even alluding to what occurred during “mediation.”¹⁰ Absent those abilities, she had no chance.

II. Reforms are Necessary to Protect against Biased Mediators and to Educate Litigants about the Ramifications of Mediation Confidentiality.

The state of current laws legalizes biased mediation, as mediators who are not neutral and can sway unsophisticated parties into entering unfavorable agreements are permitted to operate. It **misleads** litigants in calling mediators “neutrals” when “neutrality,” as the word is commonly understood, is apparently not required and might not be provided. The breadth and depth of mediation confidentiality might not be fully appreciated by anxious litigants who often “just want to get their case done” without first knowing the doctrine’s existence or potential ramifications. As such, **the current paradigm lacks express requirements for “informed consent,”** which goes to the heart of mediation policy.¹¹

Indeed, these results seem to have been the Legislature’s intended **purpose** in 1996.

The legislative history of Evidence Code section 1115 reveals that the Legislature originally considered and rejected a provision incorporating disclosure, conduct, and bias requirements in the mediation statute. The bill’s author opposed the provision because, among other issues, the bias disclosure standard ignored the wide variety of mediation situations. They included “peer (student)” disputes, “community-based” mediations and the resolution of neighborhood issues. The bill’s author did not want those loosely defined “mediators” burdened with such regulations.

The modern reality, however, is that parties in mediation expect their mediators, like judges, to be unbiased and fair. Even represented parties expect mediators, like judges, to provide opinions on the facts and the law, and the application of the latter to the former. One of the parties is often more vulnerable than the other, and they are both conducting what might be the greatest transaction of their lifetimes while under unusual and great pressures. Emotions are typically high, reasoning can be impaired and mediators therefore have great sway.

¹⁰ Evidence Code section 1128 makes any reference to a mediation in any later civil proceeding “grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.” (*In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 62, fn. 2.)

¹¹ “Informed consent is vital to the self-determination principle at the heart of mediation. Client decisions must be informed and voluntary.” (Hon. Thomas Trent Lewis, Elizabeth Potter Scully & Forrest S. Mosten, *Late Nights and Cancellation Rights: Bolstering Enforceability of Mediated Settlement with a Cooling off Period*, 38 Family Law News 1 (Issue No. 1, 2016), official publication of the California State Bar, Family Law Section.) That article suggested a “cooling off” period for parties to potentially reconsider and revoke agreements made in family law mediations. Based on principles expressed in *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, we, however, disfavor the prospect of differentiated treatment of family law litigants. Further, an arbitrary “reconsideration” period of some few days, as suggested by that article, would not have helped Catherine, who learned of the prospective billion dollar deal two weeks after she signed her deal.



Parties in family law mediations now have the protection of the holding in *In Re Marriage of Lappe* (2014) 232 Cal.App.4th 774. The *Lappe* Court avoided creating an exception to the mediation confidentiality doctrine in finding that disclosures made during mediation under the Family Code's mandate fall outside Evidence Code section 1119. (*Lappe, supra*, at 787.) An aggrieved party would now at least be able to point to those disclosures in follow-up litigation against the other party. Depending on the circumstances, that might or might not be helpful.

But *Lappe* is not a panacea. It does not apply to mediations outside of family law. It does not address mediator bias or require pre-mediation conflict disclosures or other notifications to parties. It does not allow an aggrieved party to conduct discovery into the mediation or otherwise use anything therefrom to establish liability or her damages (discussed below in relation to "fraud in the inducement" claims).

We do not advocate special treatment of family law cases. Based on principles expressed in *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, we disfavor the prospect of differentiated treatment of family law litigants. (See, e.g., footnote 12, *supra*.)

Toward reform **beyond** the issue of a potential exception to the attorney-client privilege under mediation confidentiality, we urge the following proposals.

A. Requirement of Mediator Neutrality.

Evidence Code section 1115, subdivision (b) ought to be revised to require **true neutrality** of mediators. Its current use of the term "**neutral person**" ought to mean more than "someone with a pulse who is not one of the parties." This should be accompanied by an express assertion of public policy **embracing** disclosure and **rejecting** bias. Even parties in peer disputes, community mediations and neighborhood issues ought to know that, when they turn to a "neutral person" to help with an important dispute, the "neutral" is truly neutral as laypersons understand the term.

Alternatively, the requirement for true neutrality ought to at least apply to all mediations held **in contemplation or resolution of litigation**. There is no longer a compelling rationale for denying a mediator's true neutrality to prospective or actual litigants in order to encourage mediation of other types of disputes. Contrarily, a requirement of true neutrality for litigation-related mediations would not be expected to dampen enthusiasm for the mediation of other types of disputes.

As the mediator in *Kieturakis* emphasized (ironically, in arguing **for** mediation confidentiality), "... neutrality [is] the life and breath of mediation. ... [A] party must be guaranteed that the mediator is neutral ..." (*Kieturakis, supra*, at 68.)

"The job of third parties such as mediators, conciliators and evaluators involves impartiality and neutrality, as does that of a judge, commissioner or referee" (*Howard v. Drapkin* (1990) 222 Cal.App.3d 843, 860.)



Rosco Holdings v. Bank of America (2007) 149 Cal.App.4th 1353 described a standard for determining whether an arbitration was biased: “[w]hether [a] person aware of the facts might reasonably entertain a doubt that the [arbitrators] would be able to be impartial.” (*Id.* at 1367.) The same standard could apply to mediations, too.

B. Requirement of Conflict Disclosures and Mediation Notifications that Present Parties with Options.

The law should be revised to require the pre-mediation presentation to parties of mandatory **written conflicts disclosures** that identify all of a mediator’s existing as well as reasonably foreseeable future involvement with either party.¹² It should have to be updated through the mediation’s termination.

The recent case, *Hayward v. Superior Court (Osuch)* (Aug. 3, 2016, A144823) ___ Cal.App.4th ___ <<http://www.courts.ca.gov/opinions/documents/A144823.PDF>>, emphasized the importance of written disclosures in the circumstances of “private judging.” As participants reasonably expect mediators, as well as private judges, to be truly neutral, the retention of private judges is analogous to that of mediators. The *Hayward* Opinion explained:

“Although disclosure may be onerous, matrimonial practitioners (and others who frequently participate in the...process) have a greater interest in assiduous disclosure than they may realize. ... [T]he use by the ‘small and collegial’ family law bar ‘of our friends, colleagues, and prior opposing counsel as private judges unwittingly exposes all of us, as a community and as individuals, to potential liability for violations of the various ethical canons, claims of cronyism, allegations of bias, complaints of self-dealing, and malpractice law suits. I believe that we are well intentioned, but I also believe the problems related to the inter-relationships of our bar in this way have been ‘under-discussed’ and ‘under-examined.’” (*Id.* at __ [p. 39], quoting Hersh, *Ethical Considerations in Appointing our Colleagues as Private Judge*, 31 Family Law News 31 (Issue No. 4, 2009), official publication of the California State Bar, Family Law Section.)

The law should be revised to require the pre-mediation presentation to parties of **written notifications** that inform them of the **existence and scope, and actual and potential ramifications** of mediation confidentiality. Among other things, it should warn that, under mediation confidentiality, any post-settlement discoveries of misrepresentations, omissions, or fraud that might have been committed in mediation would be difficult to investigate or rectify.

¹² For instance, canon 6D(5)(a) of the California Code of Judicial Ethics provides that in “all proceedings” temporary judges must “disclose in writing or on the record information as required by law, or information that is reasonably relevant to the question of disqualification under canon 6D(3), including personal or professional relationships known to the temporary judge...that he or she or his or her law firm has had with a party, lawyer, or law firm in the current proceeding, even though the temporary judge...concludes that there is no actual basis for disqualification.” We advocate this for mediators, too.



The written notifications should include an express **option to waive confidentiality**. Parties can and do settle their cases in non-confidential circumstances, and they should know that it is their right to try a non-confidential approach. They should be aware that “confidentiality” is **their option** instead of a tacit and apparently (to parties) unavoidable expectation of the mediation “system.” It would hurt **no one** to provide parties the opportunity to make an educated choice; **choice would be good**.

Consistent with the concerns about optics addressed in the above *Hayward* Opinion regarding “private judging,” it cannot be ignored that mediation confidentiality currently and popularly – to attorneys and mediators -- provides participating lawyers and mediators a level of insulation from scrutiny and potential recourse for mistakes and other wrongdoing not enjoyed by those practicing outside the mediation cocoon. Although the *Hayward* Opinion discussed potential “liability,” we are concerned about how the current mediation paradigm can “unwittingly [expose] all of us, as a community and as individuals, to potential appearances of...cronyism...bias...self-dealing, and [exposure-free] malpractice....” (*See id.*, at __ [p. 39] (emphasis added).) Preventing even the **appearance** of these improprieties would align with the State’s policy favoring ADR.

Parties should be allowed to actively choose whether or not they might really want confidentiality in light of the risks that have disabled Catherine in her fight for justice. The above written disclosures, notifications and presentation of options could be accomplished through the creation of mandatory Judicial Council forms.

III. Potential Post-mediation Discovery and Proceedings.

A. Set-Asides.

Advocacy for the above reforms begs the question of how to investigate and enforce them. As to the latter proposed requirement for conflict disclosures and mediation notifications that present parties with options, the recommended analysis would be binary. If all the requirements are objectively met then the settlement proceeding would be a “mediation” under Evidence Code section 1115(a). **Absent** all the requirements being met, the settlement proceeding should not be deemed a “mediation” or otherwise be subject to mediation confidentiality. A party seeking to set-aside an agreement under either scenario could utilize existing legal avenues.¹³

A party asserting an unjust settlement agreement due to mediator’s bias would have a more complicated path. Investigating and proving bias would likely involve attempting to reach into the mediation proceedings, thereby triggering mediation confidentiality. How might set-aside actions based on mediator bias be investigated and prosecuted?

One option could be to provide **no** special procedure. In this scenario a litigant would have a much better chance of investigating and proving her case if she might have originally

¹³ See, e.g., Fam. Code §2120 *et seq.*; Code Civ. Proc. §473.



appreciated and **rejected** confidentiality under the above proposed reforms. The litigant could proceed unfettered by confidentiality.

As Catherine found, it is nearly impossible to proceed under mediation confidentiality. But, a litigant who might have **chosen** confidentiality and then suspected bias would have at least given her informed consent to confidentiality under the above proposed reforms. She could still try to prove her case “around” mediation confidentiality. But the doctrine would be justly applied in this alternative scenario.

Or, special procedures could potentially be established.

For instance, the LRC, in its work concerning the potential attorney-client privilege exception to mediation confidentiality, has already considered possibilities including *in camera* judicial review of claims of wrongdoing during mediation. Another avenue could be for litigants to assert initial declarations, as allowed by the trial court but then rejected by the Supreme Court in *Foxgate Homeowners’ Ass’n, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 11. The trial court in *Kieturakis* allowed, before being reversed, a “closed courtroom” procedure.¹⁴ Current anti-SLAPP statutes require special motions where plaintiffs must meet an evidentiary standard before being allowed to proceed.¹⁵

B. Claims Made Directly against Mediators.

Apart from actions to set-aside agreements reached in mediation, claims made directly against mediators run into the doctrine of quasi-judicial immunity.

In *Howard v. Drapkin, supra*, at 852-853, the Court held, “[u]nder the concept of ‘quasi-judicial immunity,’ California courts have extended absolute judicial immunity to persons other than judges if those persons act in a judicial or quasi-judicial capacity” Mediators accused of wrongdoing in mediation would be entitled to such immunity. “... [T]here should be entitlement [for mediators] to the same immunity given others who function as neutrals in an attempt to resolve disputes.” (*Howard v. Drapkin, supra*, at 860.)

Recently *JAMS Inc. v. Superior Court (Kinsella)* (July 27, 2016, D069862) ___ Cal.App.4th ___ <<http://www.courts.ca.gov/opinions/documents/D069862.PDF>> addressed the situation where a party (the “plaintiff” in the published case) in an underlying “private judging” setting filed civil claims against JAMS and the judicial officer. The claims were based not on the judicial officer’s actions in the actual proceeding, but on asserted false advertising of the judicial officer’s background and qualifications, which had induced the plaintiff into the private judging setting. Although the substantive “misrepresentation” issues were beyond the scope of the anti-SLAPP proceedings that its Opinion addressed, the Court expressed that “... all allegations of wrongdoing relate to information [the plaintiff] specifically viewed on defendant JAMS’ [Web

¹⁴ *Kieturakis, supra*, at 68.

¹⁵ See Cal. Code Civ. Proc., § 425.16. Plaintiffs attempting to proceed against anti-SLAPP defenses must first establish a high burden of “probability” of prevailing, although that is not particularly advocated here.



site] **before** he agreed to select [the private judicial officer].” (*JAMS Inc. v. Superior Court (Kinsella)*, *supra*, at ___ [p. 6] (emphasis added).) Judicial immunity was on its mind.

Similarly, Catherine asserted a cause of action against the Firm for fraudulent inducement **before** it began its substantive work. This was expected to avoid quasi-judicial immunity. But the trial court barred this, holding “... any alleged harm is based upon what actually occurred at the mediation.” As such, mediation confidentiality blocked her under the prior inducement theory, too.

Under this logic, a litigant who might be tricked, coerced or otherwise fraudulently induced into a biased mediation is automatically rendered unable to establish damages, and thus her case as a whole, because of the mediation, itself.

Why should a party asserting fraudulent inducement in the private judging context be allowed to try to prove his damages, and thus his case as a whole, whereas a similarly situated one in the mediation context is barred by mediation confidentiality? We presently advocate no particular solution but, rather, raise the point for discussion.

The above proposals would serve the interests of justice, while still maintaining the public policy favoring mediation and other alternative dispute resolution mechanisms. Both sides of the confidentiality debate seem to agree that the number of legal malpractice suits arising out of mediations-gone-bad is likely to continue to be very small. So, the burden on mediators would likely be minimal. Catherine believes that this burden would be outweighed by policies against unjust results arising from (1) ignorant participants or (2) biased mediators.

IV. Conclusion.

A respected family law judge recently emphasized,

“[T]he fact is that anyone can hold themselves out as a family law mediator regardless of skill, training and expertise. ... Lawyers are bound by lawyer ethics, but former auto mechanics holding themselves out as family law mediators are not held to any specific ethics.”

Mediators are unregulated by the State Bar. Toward maintaining justice and the public’s trust, mediator ethics and transparency are critical.

ADR, including mediation, is more popular than ever and public policy should continue to support it. However, under the current laws, the potential bias of mediators as well as the ignorance of participants can unwittingly and otherwise expose all of us, as a community and as individuals, to potential appearances of “... cronyism ... bias ... self-dealing, and [exposure-free] malpractice ...” as the recent *Hayward* Opinion discussed in the context of private judging. Catherine’s experience emphasizes how the current paradigm expressly countenances the potential bias of mediators, ignorance of parties and major abuse. Twenty years following the implementation of the current mediation statutes, implementation of the above proposals against



mediator bias and for written disclosures, notifications, and waivers would serve the interests of justice, while still maintaining public policy favoring mediation.

The burden on scrupulous mediators and mediation-oriented counsel would likely be minimal. It would be outweighed by policies against unjust results arising from biased mediators or ignorant and unprepared parties. We urge these points without offering an opinion in the debate over an exception to attorney-client privilege in mediation. We encourage their inclusion as part of the overall discussion toward enhancing public confidence in mediation and to protect the right of litigants to a fair and impartial process.¹⁶

Catherine is aware of the Commission's fundamental charge relating to a potential exception to attorney-client confidentiality in the mediation environment. Since she feels that her experience did not hinge on any fault of her attorney, she respectfully **refrains** from directly commenting. But her experience with and from "mediation" has been powerful, and her story is a cautionary tale that needs telling. She offers her experience, perceptions and proposals toward enhancing the integrity of true mediations.

Thank you for considering my client's views. We both intend to attend the upcoming Commission meeting in Sacramento on September 22, 2016.

Sincerely,

HERRING LAW GROUP

By: 
Gregory W. Herring

GWH/ctg
cc: Client (for pre-approval)

¹⁶ See, e.g., *Peracchi, supra*, at 1251 (in the context of the judicial disqualification process).



September 1, 2016



Barbara S. Gaal, Esq.
California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, CA 94303



In Re: Mediation Confidentiality

Dear Ms. Gaal:

At the Commission's last meeting, during a discussion of other states' experience with mediation confidentiality and privilege, a question arose: Could *any* other state legitimately be compared to California?

The purpose of this letter is to answer that question, "yes." If any state can legitimately be compared to California, it is New York. New York's experience with mediation confidentiality was discussed in the Staff's memorandum 2014-35, August 28, 2014. Given the passage of two years, and the evolution of the Commission's work in that time, a review of New York's experience, and a word of analysis, may help at this time.

New York's experience with mediation confidentiality supports the position that the Commission's contemplated changes to California confidentiality law will have no adverse effect, will not dissuade people from mediating, and will not lead to an inappropriate increase in legal malpractice cases.

A page of history proves the point:

In New York, mediation confidentiality has traditionally been protected only by CPLR 4547, which reads:

Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed either as to validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible. The provisions of this section shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise



Barbara S. Gaal, Esq., September 1, 2016, p. 2

during the course of compromise negotiations. Furthermore, the exclusion established by this section shall not limit the admissibility of such evidence when it is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proof of an effort to obstruct a criminal investigation or prosecution.

This statute is substantively the same as Rule 408, Federal Rules of Evidence, and Sections 1152 and 1154, California Evidence Code. It provides only minimal protection.

The Uniform Mediation Act was approved by the National Conference of Commissioners on Uniform State Laws in August, 2001.

In 2002, the New York legislature considered the UMA. It was controversial. While the New York City Bar supported the UMA in 2002, <http://www.nycbar.org/pdf/report/UMA-2003.pdf>, the New York State Bar opposed it, <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26854>. The legislature did not enact the UMA, and CPLR 4547, with its minimal protection of mediation confidentiality, remained the law.

Then, in 2007, a case called *Hauzinger v. Hauzinger*, http://www.courts.state.ny.us/Reporter/3dseries/2007/2007_07096.htm, attracted quite a bit of attention. In that divorce action, Carl Vahl served as mediator. After the mediation, Mrs. Hauzinger subpoenaed Mr. Vahl to produce records and to testify in a proceeding to determine whether the terms of the Hauzingers' separation agreement "were fair and reasonable at the time of the making of the agreement." Mr. Vahl moved to quash the subpoena on grounds, among others, that the Hauzingers had signed a confidentiality agreement. The trial court refused to quash the subpoena, and the Appellate Division affirmed, notwithstanding the confidentiality agreement which the Hauzingers had signed. While *Hauzinger* is noted briefly at Page 36 of memorandum of 2014-35, it deserves further attention.

The Appellate Division's opinion in *Hauzinger* provoked Jeremiads from New York's mediation establishment so apocalyptic that they might even draw a flinch from California's defenders of the status quo. One sample screed can be found at <http://nyfamilymediation.com/news/hauzinger-calls-into-doubt-confidentiality-agreements/>.

Interestingly, the cure for which these diatribes called was the Uniform Mediation Act, *not* the "absolute confidentiality" standard which California currently has. Surely, by 2007, the sophisticated mediators of New York were aware of California Evidence Code 1115 et seq. Yet there is no evidence that anyone in New York called for the enactment of that standard, or thought it was a particularly good idea.



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The immediate issues arising from the Appellate Division's opinion in *Hauzinger* were resolved when the New York Court of Appeals, in June, 2008, issued its Memorandum Opinion, http://www.nycourts.gov/reporter/3dseries/2008/2008_05781.htm, noting that both spouses had expressly waived whatever confidentiality attended their mediation. Therefore, Mr. Vahl was permitted to produce documents and testify without objection. But the larger issue of the extent of mediation confidentiality in New York remained.



Despite the entreaties of New York's mediation establishment, the legislature did not act. Neither the UMA, nor any other new statute, was enacted. The minimally-protective CPLR 4547 remained, and remains, the law of the Empire State.

The sky has not fallen.

New York remains a robust and dynamic mediation marketplace. Lots of mediation takes place there. There is no evidence that people have been deterred from mediating, or that legal malpractice actions arising out of mediations have mushroomed.

In street-wise New York, with minimal mediation confidentiality, the horrors which the California mediation establishment fears have not come to pass. How much less does the Commission have to fear those horrors in California, with the slight modification to mediation confidentiality now under consideration.

Respectfully submitted,

Jeff Kichaven

JK:abm

September 7, 2016

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: *Relationship Between Mediation Confidentiality and Attorney Malpractice (Study K-402)*

Dear Commissioners:

As the Commission continues to explore, examine and research mediation confidentiality's protection of both attorney and mediator malpractice, you may wish to consider the following:

1. California has longstanding public policies that a) enforce strong consumer protection rules, and b) hold attorneys strictly accountable to clients for the highest standards of conduct. Given this time-honored setting, is continuing to protect attorney malpractice consistent with these hallmark policies?
2. If the Commission is unable to make a recommendation to remove the attorney malpractice protection, then will the Commission instead recommend verification of *informed consent* be completed by each mediation participant prior to mediation?
3. At what point will the Commission specifically address the issue of mediator malpractice? With the present confidentiality protections and the statute declaring that mediators are "*incompetent to testify*," mediator silence helps enable the continued concealment of attorney malpractice. As the Commission has noted previously, mediation is virtually unregulated. There are no statewide rules or requirements for mediators, who are in private practice. No standards of conduct, no training or other proficiency requirements. It would appear that not addressing mediator qualifications and standards means that the Commission has missed an opportunity to address the entire issue of malpractice. Malpractice committed in mediation is not limited to attorneys.

When observing the CLRC meetings, discussions and follow up communications, I have noticed speakers and writers advancing a factually-unsupportable, self-serving position that creating a malpractice exception to the confidentiality umbrella would inevitably lead to a reduction in mediation participation. I respectfully request that the Commission ask these individuals for any documentation of this oft-repeated, hollow claim. As the Commission found in its own review, the readily available evidence over decades of practical application proves otherwise. As you develop your recommendation, please do not forget that data from the states with malpractice exceptions proves that people continue to mediate and the participants are being protected.

Another argument made before the Commission, by those in opposition to a confidentiality exception, that cases involving attorney malpractice are too few to warrant action, must also fail. Focusing on "*not enough cases*" leads the Commission down a rabbit trail, and thus avoids the real question, "*How can one bring a case, when existing confidentiality rules hide evidence of malpractice?*" The claim that there is no problem, because there is no evidence, is a circular argument made by those with self-serving interests in maintaining the status quo.

I implore the Commission to take a strong stand against continuing to protect both attorney and mediator malpractice. Without recommending the elimination of the continued protection of malpractice, the present rule makes a mockery of California's long touted mantra of consumer protection, and holding attorneys to the highest standards of conduct.

Thank you for your consideration,

Nancy

Nancy Neal Yeend

**SUPPLEMENTAL COMMENTS OF PETITIONER DIANE MILLER
(BURLINGTON, CA — 8/23/16)**

I support family court reform and transparency and accountability for CAS

**SUPPLEMENTAL COMMENTS OF PETITIONER JODI MUELLER (NORTH
RICHLAND HILLS, TX — 8/22/16)**

I am sick of corruption and nobody should have to endure this! People should not be allowed to ruin lives for their own greed!! Families are being destroyed over this!

**SUPPLEMENTAL COMMENTS OF PETITIONER CAROL STREETER
(BUENA VISTA, GA — 8/22/16)**

I am signing because I have gotten caught up in a small rural county corruption, which includes the DA, & her Assist DA. I have even caught our sheriff & the Assist DA in lies about the GBI & the GBI know it but cannot do anything.

**SUPPLEMENTAL COMMENTS OF PETITIONER ROBERT GARCIA (MESA,
AZ — 8/20/16)**

I'm a Victim of this Corruption. In fact I want in. I'm willing to use my own case as an example of needed. No, i want it out there. Somebody please contact me.

**SUPPLEMENTAL COMMENTS OF PETITIONER GEORGE GARCIA
(LANCASTER, CA — 8/16/16)**

I have been through the justice system and have witnessed it first hand. I am also going through a lot with the family court and it's not good watching these judges doing things to jeopardize our kids.